89-5961 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No._____

ROBERT LACY PARKER,

PETITIONER,

v.

RICHARD L. DUGGER, Secretary, Florida Department of Corrections, and ROBERT A. BUTTERWORTH, Attorney General, State of Florida

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the application of Florida's Jury over-ride standard in an individual case subject to an Eighth Amendment review, and, if so, what standard of review is applicable?

2. Is a valid constitutional claim procedurally barred when a Defendant fails to raise it in state collateral proceedings, despite having raised it in the trial court and on direct appeal?

3. Can a harmless error analysis be applied to an erroneous jury instruction on a theory of defense which applies to one of the two prosecution theories of criminal liability?

4. May a prosecutor always cross examine a defendant about the fact that he consulted with his lawyer during a recess in the trial, or should the prosecutor first be required to proffer a good faith basis for such an interrogation?

5. In a habeas corpus proceeding presenting multiple claims for relief, does an appellate court have jurisdiction to review an order of the district court that does not dispose of all of petitioner's claims?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Robert Lacy Parker, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed June 19, 1989.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported as Parker vs. Dugger, 876, F 2d 1470 (11th Cir. 1989). Rehearing was denied on August 17, 1989.

Citations to the Appendix accompanying this Petition are designated A ___. Citations to the transcript in the state trial court are designated as T____. Citations to the state appellate Record on Appeal, which consists of the legal pleadings filed in the state trial court, is designated R____.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed on June 19, 1989, and petitioner's timely petition for rehearing and suggestion of rehearing en banc was denied on August 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right...to have the assistance of counsel for his defence,

the Eighth Amendment to the Constiution of the United States which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,

and the Fourteenth Amendment to the Constitution which provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.... .

This case also involves Section 921.141, Florida Statutes (1981), A-13; 28 U.S.C. 1291, A-16; Rule 54(b), Fed R. Civ. Procedure, A-17.

STATEMENT OF THE CASE

A. Course of prior proceedings.

Robert Parker was charged with three counts of first degree murder in the shooting deaths of Richard Padgett (Count One), Nancy Sheppard (Count Two), and Jody Dalton (Count Three). At trial, Petitioner's jury found him guilty as charged in Counts One and Two, and guilty of third degree murder in Count Three. At the advisory sentencing proceeding, the jury recommended life sentences for both Counts One and Two. The trial court judge followed the recommendation as to Count One, but overrode the recommendation as to Count Two, and sentenced Petitioner to death. Petitioner received a consecutive fifteen year sentence on Count Three.

The convictions and sentences were affirmed by the Florida Supreme Court on direct appeal. Parker v. State, 458 So.2d 750 (Fla. 1984). A-6. This Court denied Certiorari. Parker v. Florida, 470 U.S. 1088 (1985). The petitioner filed a motion to vacate his convictions and sentence pursuant to Florida Rule of Criminal Procedure 3.850 on May 19, 1986. A death warrant was

signed June 20, 1986. The motion to vacate was denied in the trial court and affirmed on appeal. Parker v. State, 491 So.2d 532 (Fla. 1986). A-4.

The petitioner filed his petition for writ of habeas corpus in the U.S. District Court for the Middle District of Florida on July 12, 1986. The District Court issued a stay of execution and heard oral argument on the petition on July 24, 1986. The court then conducted an evidentiary hearing concerning cash payments by the prosecutor to state witnesses on February 18, 1987. Subsequently, the District Court entered an order denying relief as to Parker's convictions but ordering resentencing by the state trial judge. A-3. The state appealed the District Court's order as to the sentence, and the petitioner cross appealed as to the convictions. On appeal, the Eleventh Circuit affirmed the District Court's ruling as to the petitioner's convictions, and reversed the District Court's order vacating the death sentence. Parker vs. Dugger, 876 F.2d 1470 (11th Cir. 1989). A-1. The petitioner's suggestion for rehearing en banc and petition for rehearing were denied on August 17, 1989. A-2. A second death warrant was signed October 18, 1989, with execution scheduled for November 9, 1989.

B. Facts material to the consideration of the questions presented.

1. Generally

The "facts" as stated in the Eleventh Circuit's opinion are taken from the trial court's sentencing order. They are not supported by the evidence, and the Florida Supreme Court provided a more accurate statement:

> The state introduced evidence at trial that Robert Parker was a drug dealer and Tommy Groover sold drugs for him. Groover had allegedly fronted some drugs to Padgett. When Groover was unable to pay Parker, Parker allegedly threatened to hang Groover unless the debt was satisfied. Testimony indicated Parker was of a violent temperament, had possession of firearms, and was irritated over the drug debt. Uncontroverted evidence showed that Padgett was located at a bar, taken to Parker's junk yard and beaten by Groover and driven into the woods and shot by Groover. Later that same evening, Groover beat and shot Jody Dalton, and Parker helped weight her body and sink it in a lake.

> Finally, Nancy Sheppard, Padgett's 17 year old girl friend, was lured from her home and taken to the ditch where Padgett's body had been left. She was killed by Billy Long, who testified that he was ordered to kill her by Parker, who threatened to kill him in her place unless Long complied. Parker then took Sheppard's necklace and ring from her body.
>
> Parker did not deny being present during these events, but he testified in his own behalf that he had been an unwilling accomplice, forced into co-operation by Groover's threats against Parker's family. He further claimed to have had no indication that Groover planned to kill Padgett or Dalton and that these murders were not part of any common scheme or in furtherance of any common goal. On the contrary, Parker claimed friendship with Padgett and disclaimed more than the slightest acquaintance with either of the women. Parker v. State, 458 So.2d 750, 751-2 (Fla. 1984).

2. Facts relevant to the jury override issue.

In Florida's advisory jury sentencing process, the Florida Supreme Court has devised the Tedder standard for trial judges to apply when the jury recommends a sentence of life imprisonment. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Florida Supreme Court has stated that, in reviewing jury over-rides, it is their duty to examine the record to determine if there was a reasonable basis for the jury recommendation. Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979). A jury life recommendation eliminates the presumption that death is the appropriate penalty when one or more aggravating circumstances are present. Williams v. State, 386 So.2d 538 (Fla. 1980). In other cases, the Florida Supreme Court has analyzed the record to determine what mitigating factors exist that could have influenced the jury to return a life recommendation, even where the trial judge found no mitigating circumstances. Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Richardson v. State, 437 So.2d 1087 (Fla. 1983); Neary v. State, 384 So.2d 881 (Fla. 1980). If there are such mitigating factors, the jury recommendation is reasonable, and a life sentence should be imposed. Id.

At the trial and penalty phase in this cause, the petitioner presented evidence and argued the existence of the following mitigating factors to the jury, all of which have been recognized by the Florida Supreme Court as a reasonable basis for a jury life recommendation that requires reversal of a jury override:

a. The statutory mitigating circumstance that the defendant was under extreme duress or substantial domination of another person. Fla. Stat. 921.141(6)(e). See, Goodwin v. State, 405 So.2d 170 (Fla.1981); Hawkins v. State, 436 So.2d 44 (Fla.1983).

b. The statutory mitigating circumstances that the defendant was under the influence of extreme mental or emotional disturbance, Fla. Stat. 921.141(6)(b), and that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired. Fla. Stat. 921.141(6)(f), due to his alcohol and drug intoxication. Buckrem v. State, 355 So.2d 111 (Fla. 1978); Kampff v. State, 371 So.2d 1007 (Fla.1979); Norris v. State, 429 So.2d 688 (Fla.1983). Amazon v. State, 487 So.2d (Fla. 1986); Fead v State, 512 So.2d 176 (Fla. 1987); Masterson v. State, 516 So.2d 256 (Fla. 1987). Drug or alcohol intoxication has also been been found to be a non-statutory mitigating circumstance. Id.

c. The statutory mitigating circumstance that the defendant was an accomplice in the capital felony and his participation was relatively minor. Fla. Stat. 921.141 (6)(d). The Florida Supreme Court had considered this as either a statutory or non-statutory mitigating circumstance in numerous cases where the defendant was not the actual perpetrator or where there was dispute as to the extent of his participation in the offense. Taylor v. State, 294 So.2d 648 (Fla.1974); Slater v. State, 316 So.2d 539 (Fla.1975); McCaskill v. State, 344 So.2d 1276 (Fla.1977); Malloy v.State, 382 So.2d 1190 (Fla. 1979); Hawkins v. State, 436 So.2d 44 (Fla.1983).

d. Petitioner presented "copious" evidence of non statutory mitigation. Parker v. Dugger, 876 F.2d 1470, 1475 n.7

(11th Cir.1989). This included evidence of Petitioner's upbringing which showed that Petitioner was raised in a very close family in which he contributed his share of "chores" (T.2231-2). The evidence showed that Petitioner's father was an alcoholic who beat his mother in Petitioner's presence. (T. 2322-3). Petitioner's father began giving the Petitioner alcoholic beverages and taking him to bars at an early age. (T.2323-4). Robert Parker began dating Elaine, his co-defendant in this case, when he was only fourteen years old and Elaine was sixteen years old. (T.2325). Robert married Elaine when he was sixteen, because she was pregnant. (T.2326-7). Elaine supported Robert and their baby with money from her job; Robert was unemployed and took care of his baby son and later his baby daughter. (T.2327-30). The evidence showed that Elaine introduced Robert to the use of illegal drugs. (T.2357-8). Robert developed a drug and alcohol problem and sought professional help, but Elaine was not supportive. (T.2330). Elaine was the dominant figure in the relationship. (T.2333,2361). Petitioner was primarily a house husband while his wife worked. (T.2358-9). Robert had been so distraught over their marital problems that he attempted suicide when Elaine left him. (T.2332). The Petitioner had always been a good father to his children and maintained a very close relationship with them. (T.2338-9,2342-4,2346,2351-2,2361). Petitioner had a son, Robbie, age eleven at the time of the trial, and Allison, age nine at the time of the trial. The children were introduced to the jury. (T.2338-9). The evidence also showed that Petitioner had gone out of his way on numerous occasions to help his relatives and neighbors. This included taking a neighbor's husband to the hospital three or four times a month for over a year for radiation therapy, as a favor and without reimbursement. (T.2346-8). Such character and background evidence is normally considered a reasonable basis for a jury life recommendation. See, Jacobs v. State, 396 So.2d 713 (Fla.1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Washington v. State, 432 So.2d 44 (Fla. 1983); Wasco v. State, 505 So.2d 1314 (Fla.1987).

e. The non-statutory mitigating circumstance that the jury could have believed petitioner's testimony as to his lesser culpability and still found him guilty. Malloy v. State, 382 So.2d 1190 (Fla. 1979); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988).

f. The non statutory mitigating circumstance that the principle of equal justice required a life sentence because none of the co-defendants had been sentenced to death for the Sheppard murder. The evidence showed that Groover, the perpetrator in the murders of Padgett and Dalton, was sentenced to death for those murders, but to life for the murder of Nancy Sheppard. Billy Long, who actually perpertrated the Sheppard murder by shooting her five times, was allowed to plead guilty to second degree murder and is eligible for parole. Elaine Parker, who owned the car and gun, drove the car, lured Sheppard out of her home, and gave Long the murder weapon, was also allowed to plead guilty to second degree murder. Under such circumstances, the Florida Supreme Court has, in other cases, routinely ruled that a life recommendation is reasonable.

> This court has upheld the reasonableness of jury recommendations of life which could have been based, to some degree on the treatment accorded one equally culpable of the murder. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). In such cases we have reversed the Judge's decision to override the recommendation when the accomplice was a principle in the first degree; Herzog v. State, 439 So.2d 1372 (Fla. 1983); McCampbell v. State; when the accomplice was the actual trigger man; Barfield v. State, 402 So.2d 377 (Fla. 1981); Slater v. State, 316 So.2d 539 (Fla. 1975); when the evidence was equivocal as to whether defendant or the accomplice committed the actual murder; Smith v. State, 403 So.2d 933 (Fla. 1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Halliwell v. State, 323 So.2d 557 (Fla. 1975); or when the accomplice was the controlling force instigating the murder; Stokes v. State, 403 So.2d 377 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1980). Quoted from Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984).

Had this principle been applied consistently to Petitioner's case, where the evidence was in sharp dispute as to the extent of Robert Parker's participation in any of the homicides, the Florida Supreme Court should have reduced this sentence to life

imprisonment. See, also, Hawkins v. State, 436 So.2d 44 (Fla. 1983); Brookings v. State, 495 So.2d 135 (Fla. 1986); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988).

After hearing this evidence, the jury returned a specific verdict form in which they found that there were sufficient aggravating circumstances to justify a death sentence, but that the mitigating circumstances outweighed the aggravating circumstances and, therefore, the jury recommended life. A-8. Despite this recommendation with a clear finding of the existence of mitigating circumstances, the trial court judge found six statutory aggravating circumstances, no mitigating circumstances, and sentenced petitioner to death. On direct appeal, the Florida Supreme Court vacated two of the aggravating circumstances, but affirmed the jury override because the trial judge found no mitigating circumstances. Parker v. State, 458 So.2d 750, 754, (Fla. 1984). In his habeas corpus petition, petitioner alleged that the Tedder standard of review of jury overrides had been applied in his case in an arbitrary, capricious and disproportionate manner. The Attorney General's position was that the application of the Tedder jury override standard was purely a matter of state law and not subject to federal review. The District Court agreed with petitioner, ordered his death sentence set aside, and ordered a resentencing by the state trial court judge. The State appealed, and again argued that the application of the Tedder standard was purely a matter of state law, not subject to federal review. The Eleventh Circuit agreed that the application of the Tedder standard by the Florida Supreme Court is subject to federal review, but disagreed that it had been arbitrarily and capriciously applied in this case. Parker v. Dugger, id. at 1473-6.

3. Facts Relevant to Procedural Default Issue

In Stromberg v. California, 283 U.S. 359 (1931), this court stated the rule that the due process clause to the Fourteenth Amendment requires that a general guilty verdict be

set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of the grounds is insufficient, because the verdict may have rested exclusively on that ground. See, Zant v. Stephens, 462 U.S. 862, 882 (1983). At the charge conference in petitioner's trial, the prosecutor requested that the jury be instructed as to the law of first degree felony murder, as to both counts one and two, arguing that the applicable felony in count one was kidnapping and, in count two, robbery. A-10. Petitioner objected to the felony murder instruction as being unsupported by the evidence. A-10. During summation, the prosecutors repeatedly argued that the petitioner was guilty of first degree murder in counts one and two, even if his own testimony was accepted as true, because of the felony murder rule, and because duress was not a defense. (See number 4 below). (T.2148-9, 2153, 2264, 2274-5). The jury was instructed as to first degree felony murder in counts one and two, (R.388), and returned general verdicts of guilty. A-9. On direct appeal, the Florida Supreme Court held that the evidence of the underlying felony as to count two was insufficient. Parker v. State, 458 So.2d 750, 754 (Fla. 1984). In affirming petitioner's conviction, the court said, "In addition to considering all other issues raised on appeal, we have conducted an independent review of the record on trial and found no reason to award a new trial." Id. As the District Court noted, this issue was "clearly raised" at trial and "the Florida Supreme Court could not have overlooked" the issue. A-3. Petitioner then filed a Motion for Rehearing with the Florida Supreme Court, pointing out that the felony murder instruction could have caused the jury to convict petitioner on a theory of guilt that was unsupported by the evidence. A-11. Rehearing was denied without opinion.

The Eleventh Circuit panel declined to reach the merits of this claim, however, and inexplicably found that the issue had never been raised in the state court. Parker v. Dugger, at 1477. The panel opinion stated, alternatively, that even if the issue had been raised in state court on direct appeal, it was procedurally barred because it had not been raised in state collateral review. Id, at 1477 n.10.

4. Facts relevant to the jury instruction issue

The State's theory of prosecution as to Count Two, the murder of Nancy Sheppard, was in the alternative: premeditated murder, or felony (robbery) murder. The jury was instructed on felony murder over objection. (See number three above). The prosecutor argued felony murder in his summation, (T.2274-5), as well as premeditated murder. At the charge conference in this cause, the defendant requested that the jury be instructed on the defense of duress, (T.2087-90). The state objected and requested the court give an instruction that duress is not a defense to homicide, at all. (T.2093-6). A-12. This instruction was granted and given despite petitioner's objection that duress is a defense to felony murder,if not to intentional murder. (T.2119-22, 2265-6). During summation, the prosecutors argued that the defendant was guilty, even if his testimony was believed, because duress was not a defense to homicide. (T.2147-9, 2153).

Duress or coercion has long been recognized as a proper defense in Florida. Hall v. State, 136 Fla. 644, 187 So.392 (1939). Duress is not a defense, however, that is available to the perpretator of an intentional homicide. Wright v. State, 402 So.2d 493 (Fla. 3rd DCA 1981); Cawthon v. State, 382 So.2d 796 (Fla.1st DCA 1980). These cases left open the question of duress as a defense to felony murder. See, Chestnut v. State, 505 So.2d 1352, 1354 (Fla. 1st DCA 1987). It is, however, settled that duress is a defense to robbery, the underlying felony in this case. Koontz v. State, 204 So.2d 224 (Fla. 2nd DCA 1967). The Florida Supreme Court has assumed, without deciding, that duress is a defense to felony murder. See, Goodwin v. State, 405 So.2d 170 (Fla. 1981); Hawkins v. State, 436 So.2d 44 (Fla. 1983). Indeed, the Florida Supreme Court noted that petitioner's defense was duress, and incorrectly indicated that the jury rejected this defense in reaching its verdict. Parker v. State, 458 So.2d 750, 753 (Fla. 1984). Though it was raised on direct appeal, the Florida Supreme Court did not note that the incorrect instruction by the trial court had made the duress defense impossible to assert, and did not even discuss the issue.

The Eleventh Circuit ruled that petitioner's requested instruction was misleading because it implied that duress was a defense to intentional murder as well as to felony murder. Parker v. Dugger, at 1479. The lower court failed to note that petitioner had requested a qualifying instruction that duress was a defense only to felony murder. A-12. Regardless, the state's requested jury instruction that duress could never be a defense to murder was equally misleading and should not have been given. The trial court effectively directed a verdict of guilt by telling the jury that duress was not a defense. In light of the jury's life recommendation (See number two above), it is probable that the petitioner's duress defense was accepted, but that the jury convicted because of the court's instructions. Based on the trial court's instructions, the jury had to find petitioner guilty if it believed that he participated out of duress. The record clearly demonstrates that a legally correct instruction (i.e. that duress was only a defense to felony murder) was requested, and that a legally incorrect instruction (i.e. that duress was not a defense at all) was given. The effect of the Eleventh Circuit's decision is to find that the legally incorrect instruction given by the trial court was harmless because it was legally correct as to one of the theories of prosecution. The end result is the possibility, if not the probability, that petitioner was convicted based on a legal theory that was not supported by the evidence and an incorrect instruction that his defense could not be considered.

5. Facts Relevant to Cross-Examination Issue

In Geders v. U.S., 425 U.S. 80 (1976), this Court held that it violated a defendant's Sixth Amendment right to counsel to prohibit him from consulting with his lawyer during an overnight recess in the trial. The Court noted that a prosecutor could cross-examine a defendant as to the extent of any "coaching" during the recess, subject to the control of the Court. Id., at 89. This Court at that time had no reason to address the permissible nature of such an examination. This case, however, demonstrates the need for guidance in this area.

In the trial court below, trial counsel was permitted to confer with the defendant during a brief recess in the defendant's cross-examination. This is a right that had been established by state as well as federal law. Bova v. State, 410 So.2d 1343 (Fla. 1982). However, neither the defendant nor his counsel had any idea that the mere fact that he had exercised this right would be used to impugn his credibility. The prosecutor proceeded as follows:

Q: All you have done for the last year is think about this, isn't it?
A: I thought about it, yes.
Q: You are well-coached, aren't you?
A: No, sir.
Q: He's been coaching you day in and day out, hasn't he?
A: He's talked to me, he hasn't been coaching me.
Q: He even talked to you today during the recess, didn't he?
(Objection over-ruled)
Q: You even talked to him during the recess a little while ago, didn't you?
A: Yes sir, I did.
(Objection over-ruled)
Q: You have talked to him hundreds of times, haven't you?
A: Yes sir, several times.
Q: Several, three?
A: No, sir.
Q: More liked a hundred?
A: Probably.

(A.14)

The Eleventh Circuit dismissed this claim, stating that the prosecution may cross-examine a defendant as to the extent of any coaching during a recess, "subject to the control of the trial judge." Parker v. Dugger, at 1480. With this general principle there can be no dispute, but without guidance from this Court, an examination such as the one above could occur in virtually every criminal trial where a defendant consults with counsel during a recess. It is a generic cross-examination in which the defendant is not even asked whether any coaching occurred during the recess, or even what was discussed during the recess. The accusation of coaching is made, then the fact that the defendant met with counsel during the recess is made known, as if to confirm that coaching did occur, and to infer that there is some impropriety in talking during a recess. There was no attempt by the prosecutor to find out what actually had transpired during the recess. The prosecutor was not required to state the basis

of his belief that coaching had occurred nor did he proffer any facts to support the accusations he made. This was not an attempt to determine if there was any impropriety. It was an attempt to infer impropriety from the mere fact of consultation with defense counsel.

6. Facts relevant to Jurisdictional Issue

In his habeas corpus petition, Robert Parker raised fifteen claims for relief. The U.S. District Court denied relief on twelve of the claims, but ordered resentencing on the ground that the trial judge's override of the jury's life recommendation, and its affirmance by the Florida Supreme Court, was an arbitrary application of the Tedder jury override standard. A-3. The District Court did not reach two of the claims in the habeas petition because they related solely to the constitutionality of the death sentence and, as such, the Court believed they could be presented to the state courts at resentencing. A-3.

Petitioner's death warrant was signed on October 18, 1989, soon after rehearing was denied in the Eleventh Circuit. Petitioner filed an Emergency Motion for Recall of Mandate and Stay of Execution Pending Remand to District Court on October 30, 1989. This Motion challenged the jurisdiction of the Eleventh Circuit to re-instate Petitioner's death sentence. Said Motion was denied by order dated November 2, 1989. A-15.

REASONS FOR ALLOWANCE OF THE WRIT

1. JURY OVERRIDE ISSUE

In Spaziano v. Florida, 468 U.S. 447 (1984), this court upheld the constitutionality of Florida's jury override scheme, in part because of the "significant safeguard" accorded capital defendants by the Tedder standard, and in part because meaningful appellate review by the Florida Supreme Court reduced the likelihood that the death penalty would be imposed in an arbitrary or discriminatory manner. Id, at 465, 466. This Court further found no indication that the application of the jury override procedure resulted in the unconstitutional application of the death penalty in general, or in the case before it. Id, at 466. This Court, however, left open the questions as to whether the application of the Tedder standard in a particular case would be subject to federal review after Spaziano, and, if so, what standard of review would be utilized. Spaziano was decided on July 2, 1984. Petitioner's conviction was affirmed by the Florida Supreme Court on September 6, 1984. In petitioner's habeas petition, he alleged that the Florida Supreme Court had changed its application of the Tedder standard after the Spaziano decision, alleging that the Florida Supreme Court had reviewed 62 jury overrides prior to Spaziano and upheld only 18 of them, but that the court had upheld 10 out of 17 overrides after Spaziano. Recent decisions of the Florida Supreme Court have confirmed petitioner's allegations, if not his statistics. In Cochran v. State, 547 So.2d. 928 (Fla. 1989), the Florida Supreme Court flatly stated that its application of the Tedder standard had changed:

> ...as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So.2d 833, 851 (Fla. 1988)(Shaw, J., specially concurring): During 1984-85, we affirmed on direct appeal trial judge overrides in 11 of 15 cases, 73%. By contrast, during 1986 and 1987, we have affirmed overrides in only 2 of 11 cases, less than 20%. This current reversal rate of over 80% is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation...
>
> Clearly, since 1985, the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ", Tedder 322 So.2d at 910. Cochran, Id, at 933

The Florida Supreme Court has also noted that its standard of review of capital sentences has changed since this Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987).

> Hitchcock rejected a prior line of cases issued by this court, which had held that the mere opportunity to present non statutory mitigating evidence was sufficient to meet Lockett requirements. Under this "mere presentation" standard we routinely declined to consider whether the judge or jury actually weighed the evidence in question. Downs v. Dugger, 514 So.2d 1069, 1071, (Fla.1987).

This explains the Florida Supreme Court's failure to acknowledge the extensive mitigating evidence presented to the judge and jury in Parker's case. The Florida Supreme Court did not, at the time of petitioner's direct appeal, require that the trial judge and jury consider non-statutory mitigating circumstances, only that a defendant be permitted to present it. However, the right to have the advisory jury consider non-statutory mitigating evidence would be vitiated if such evidence could not form a reasonable basis for a life recommendation. "The right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration." Franklin v. Lynaugh, 108 S.Ct. 2320, 2333 (1988) (O'Connor, Jr., concurring).

The Florida Supreme Court has thus conceded that it not only applied Tedder in an inconsistent manner during the period it decided petitioner's appeal, it has also conceded that it applied a constitutionally deficient standard of review of non-statutory mitigating circumstances during the same period. The trial judge's decision to override the jury's life recommendation, and the Florida Supreme Court's decision affirming the override, were arbitrary because they were inconsistent with both Hitchcock, and the Florida Supreme Court's own application of the Tedder standard.

The trial court's sentencing order affirmatively states that the court found no mitigating circumstances. A-7. The District Court noted that it appeared that the trial judge violated Hitchcock in petitioner's case by failing to consider non-statutory mitigating circumstances in over-riding the jury. A-

3. Remarkably, in direct contradiction to the holding of the Florida Supreme Court, the Eleventh Circuit held that the trial judge did find non-statutory mitigating factors to be present. Parker v. Dugger, id. at 1475.

It is significant that, before Hitchcock, this trial judge had never found a mitigating circumstance when imposing a death sentence. See, Barclay v. Florida, 463 U.S. 939 (1983), (dissenting opinion of J.Marshall). Indeed, Judge Olliff did not even find a mitigating circumstance in imposing a life sentence for the Padgett murder! A-7. This Court is well aware that this judge is not adverse to over-ruling a jury's mercy recommendation. Barclay, id.; Dobbert v. Florida, 432 U.S. 282 (1977). Judge Olliff's practice of finding no mitigating circumstances in sentencing a defendant to death supports the conclusion that findings of aggravating and mitigating circumstances in override cases are seen more by the judge as an effort to justify, rather than to direct, the sentencing decision. See, Radelet, "Rejecting the Jury,"18 U.C. Davis L. Rev. 1409, 1414 (1985). Indeed, the sentencing practices of judges in Jacksonville generally, ("the death penalty capital of the United States"), and Judge Olliff, in particular, have acquired a good deal of notoriety for just this reason. See, Geimer & Amsterdam, "Why Jurors Vote Life or Death," 15 Am.J.Crim.Law 1,7-8, 19-20 (1988); Geimer, "Death at Any Cost," 12 F.S.U. L. Rev. 737, 774 (1985).

As the District Court noted, the stated reason for sentencing Parker to death for the murder of Sheppard and not Padgett was that ..."the shooting and throat cutting and robbery of the helpless 17-year old girl was so heartless and atrocious as to indicate a murderer without conscience or pity."A-7. However, Padgett's murder also included shooting, stabbing, and throat cutting. Furthermore, the Florida Supreme Court ruled that there was no robbery in the Sheppard murder, and that the Sheppard murder was not atrocious. The trial judge's remaining consideration, that the victim was a "helpless 17-year old girl," demonstrates an improper consideration of the character of the

victim. South Carolina v.Gathers, 109 S.Ct. 2207 (1989). The District Court recognized that such considerations would be improper under this Court's ruling in Booth v. Maryland, 482 U.S. 496 (1987), and noted that the only evidence that the trial judge heard that the jury did not was testimony from relatives of the victims, asking the court to impose the death penalty. A-3.

To summarize, Robert Parker's death sentence was imposed despite a life recommendation from a jury that was presented with substantial and, in most instances, uncontradicted evidence of mitigating circumstances that had been previously recognized by the Florida Supreme Court. The trial judge heard impermissible victim impact testimony, made no mention of the non-statutory mitigation that had been presented, and sentenced Petitioner to death. The Florida Supreme Court affirmed the over-ride during a period when, by its own admission, the Court was applying the Tedder standard in an inconsistent manner, and when its standard of review of Hitchcock errors was defective. The U. S. District Court noted these problems and set aside the death sentence. The Eleventh Circuit then reversed the District Court, stating that the trial judge did find non-statutory mitigation (despite the Flordia Supreme Court's pronouncement to the contrary), and applied a constitutionally deficient Eighth Amendment standard of review.

The Eleventh Circuit agrees that the application of the Tedder standard is subject to federal scrutiny, but appears to apply an abuse of discretion standard of review. In other words, the appellate court has adopted a standard whereby the court examines the record to see if it can find any reason for the judge to overrule the jury recommendation, and if such a reason can be found, the override is held to be "non arbitrary". This, however, is not an Eighth Amendment analysis such as that conducted by this Court in the past. In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court evaluated the application of an aggravating circumstance in Georgia's death penalty scheme to determine if it was being applied in an arbitrary and capricious manner. In so doing, this Court undertook an extensive analysis

of the application of that aggravating circumstance in other Georgia Supreme Court opinions. Such an analysis was necessary to determine whether the aggravating circumstance had been applied in an arbitrary or capricious manner to Mr. Godfrey. This Court then found that the circumstance had been unconstitutionally applied because "there is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id, at 433. In Maynard v. Cartwright, 108 S.Ct. 1853 (1988), this court approved the manner in which the Tenth Circuit had concluded that an aggravating circumstance had been unconstitutionally applied. The Tenth Circuit in Maynard had performed an analysis similar to that of this court in Godfrey. Most importantly, this court rejected ..."the (state's) submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty..." Maynard id, at 1859.

If the Godfrey - Maynard standard of review is applied, it is clear that the death sentence must fall, because there is no principled way to distinguish this case in which the jury override was sustained, from the many cases in which it was not. Indeed, in no other Florida case has a jury override been sustained where a perpertrator was given a plea bargain for a lesser sentence and an aider and abettor who killed no one received the death sentence. This court should grant certiorari because the Eleventh Circuit has decided an issue left unresolved by this court in Spaziano, and has utilized a standard of review that is inconsistent with the Eighth Amendment as interpreted by this court in Godfrey and Maynard. Even though the Florida Supreme Court has conceded that the Tedder standard was being applied in an inconsistent fashion in 1984 and 1985, petitioner can hope for no relief from the present Florida Supreme Court. See, Johnson v. Dugger, 523 So.2d 161(Fla. 1988). This is an issue that has previously been brought to this Court's attention but left undecided. See, Heiney v. Florida, 469 U.S. 920 (1984)

Eutzy v. Florida, 471 U.S. 1045 (1985); Engle v. Florida, 108 S.Ct. 1094 (1988). It is an issue that will continue to appear until it is resolved by this Court.

Moreoever, it is an issue very similar to the issue presented in Ricketts v. Jeffers, No. 89-189, cert. granted 46 Cr.L.Rptr. 3029 (Oct. 11, 1989). In Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), the court of appeals analyzed the Arizona Supreme Court's application of the Arizona heinous or depraved aggravating circumstance. The court determined that the facts of that case fell so far outside the standard developed by the Arizona Supreme Court for determining whether conduct was heinous or depraved that it would be arbitrary and capricious to apply the aggravating circumstance to Jeffers. Id. at 486. The court of appeals explicitly rejected the notion that its review was limited to "determining whether a rational factfinder could have determined Jeffers' crime to have been heinous or depraved." Id. at 486 n.9.

In the instant case, the Eleventh Circuit applied the exact opposite of the Ninth Circuit's analysis in Jeffers. Rather than review the Florida Supreme Court's application of the Tedder jury override standard to determine whether the affirmance of the override in Parker's case was so inconsistent as to be arbitrary and capricious the Eleventh Circuit simply reviewed the record to see if there was any possible basis for the override decision, explicitly rejecting the district court's analysis, which was analogous to that of the court of appeals in Jeffers. Parker v. Dugger, 876 F.2d at 1474-76. Accordingly, the rationales of the courts in Parker and Jeffers are in direct conflict, and the issue on which this Court took certiorari in Jeffers is necessarily presented in this case.

2. Procedural Default Issue

The panel opinion involves both a misapplication of, and a misinterpretation of, this court's decision in Harris v. Reed, 109 S.Ct. 1038 (1989). This court in Harris held that the "plain statement" rule applies to federal habeas proceedings. Clearly, there was no plain statement from the Florida Supreme

Court that the due process issue was procedurally barred. The panel opinion finds procedural bar, however, because petitioner did not raise this issue in state collateral proceedings. Because the last state court rendering judgment in this case was the Florida Supreme Court's decision affirming the denial of petitioner's state collateral attack on his conviction, the Eleventh Circuit found procedural bar as to this issue. Parker v.Dugger, at 1477. This court should grant the Writ to clarify what it meant in Harris by "the last state court rendering judgment in the case," Harris, id, at 1043. In other words, if a habeas petitioner raises an issue on direct appeal in state court, and then raises other issues in collateral review in state court, will he be procedurally barred from raising the issues he raised on direct appeal in federal habeas if he did not raise them again in state collateral review, where the state court on direct appeal failed to address the issue? The Eleventh Circuit's decision in this case conflicts with this court's decision in Harris, and creates an unfortunate, if not dangerous, interpretation of the "last state court rendering judgment in the case".

3. Jury Instruction Issue

The Fourteenth Amendment to the United States Constitution guarantees defendants a meaningful opportunity to present a defense; an essential component of procedural fairness is an opportunity to be heard. Crane v. Kentucky 476 U.S. 683 (1986.) Other circuit courts of appeal have not failed to intervene in state criminal convictions where the trial court failed to properly instruct on a valid defense, or on the elements of the crime. In Kibbe v. Henderson, 534 F.2d 493 (2nd Circuit 1976), where cause of death was raised as a defense to a murder charge, the failure of the trial court to properly instruct on causation was held to violate due process. In U.S. ex rel Means v. Solem, 646 F.2d 322 (8th Cir. 1980), a due process violation was found where the trial court erroneously ruled that self-defense was not available to the offense charged. In Glenn v. Dallman, 686 F.2d 418 (6th Cir. 1982), the

failure to instruct a jury on an essential element of the crime charged was held to violate due process. In Plunkett v. Estelle, 709 F.2d 1004 (5th Cir. 1983), jury instructions that permitted the jury to convict the defendant upon a non-charged theory of murder was held to violate due process. A due process violation was found where a state trial court had erroneously ruled that duress was not a defense to murder in U.S. ex rel Reed v. Lane, 759 F.2d 618 (7th Cir. 1985). In this case, the due process violation is more egregious than in any of those above cited. The trial court not only failed to instruct the jury that duress was a defense to felony murder, it affirmatively instructed the jury that duress was not a defense. Not only was the jury here incorrectly instructed that they could convict petitioner on a felony murder theory that was unsupported by the evidence, they were also incorrectly told that petitioner's defense to that theory could not be considered.

This Court has repeatedly held that due process requires the state to prove every element of a charged offense beyond a reasonable doubt, and that jury instructions that have the effect of relieving a state of their burden violate a defendant's due process rights. Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). "Such directions subvert the presumption of innocence accorded to accused persons, and also invade the truth-finding task assigned solely to juries in criminal cases." Carella v. California, 109 S.Ct. 2419, 2420 (1989). Here, the State was relieved of its burden of proving that Petitioner had any intent to kill by the giving of the felony-murder instruction. The state was then relieved of its burden of proving that the Petitioner had the requisite intent to participate in the underlying felony of robbery by the giving of the "duress is not a defense" instruction. The end result is that Petitioner may have been convicted of first degree murder without any jury finding that he either intended to kill or intended to participate in a robbery.

That the petitioner was prejudiced by these erroneous instructions cannot reasonably be doubted. The jury's acceptance

of the duress evidence was a likely basis for the jury's life recommendation. Petitioner denied assisting with or participating in the murder of Nancy Sheppard, admitting only presence at the scene. However, he did not deny taking Ms. Sheppard's necklace and ring after the homicide was completed. On this evidence, the jury could have believed the petitioner's trial testimony, and still convicted him on a robbery murder theory, after being told that duress was not a defense. Given the paucity of evidence to rebut petitioner's duress defense, a legally correct duress instruction could have resulted in petitioner's acquittal as to this count. Had the jury not been incorrectly instructed on felony murder as to this count, petitioner might likewise have been acquitted. This is not fanciful speculation. The state argued vigorously that the jury should convict Robert Parker of first degree murder even if it believed his testimony. (T.2147-9, 2153). This court should grant Certiorari as to this issue in order to correct what will otherwise be a grave miscarriage of justice.

4. Cross-Examination Issue.

This Court has previously held that it is fundamentally unfair, and a violation of due process, to provide an accused with a constitutional privilege, and then to penalize him for its use at trial. Doyle v. Ohio 426 U.S. 610, (1976); Johnson v. U.S., 318 U.S. 189 (1943). Here, the defendant asserted his right to consult with counsel during the recess, and the Court permitted the consultation. The consultation might well have never occurred, however, had the defendant and counsel been aware of the way they would be attacked for using it.

The opinion in Geders provides little guidance as to how a prosecutor can cross-examine about the extent of improper coaching, without making the consultation with counsel itself appear improper, and without infringing on the attorney-client privilege. As this Court has noted, lawyers confer with their clients during breaks in their testimony frequently, Perry v. Leeke, 109 S.Ct. 594, 598 n.2 (1989). Recently, in U.S. v.

Zolin, 109 S.Ct. 2619 (1989), this Court held that a judge should require a showing of a factual basis adequate to support a "good faith belief by a reasonable person" before performing even an in-camera inspection of privileged material, to determine if the crime fraud exception to the attorney-client privilege should permit their disclosure. Id. at 2631. It would seem that communications during trial should receive at least equivalent protection. However, Geders can be read to mean that a prosecutor can ask virtually anything about a recess consultation, and that the attorney-client privilege does not apply to communications had during the recess.

Unless this Court offers guidance, the "generic cross" described above will be utilized routinely and the right to consult with counsel during a trial recess will become too costly a right to exercise.

5. Jurisdictional Issue

Review by a federal appellate court is limited to "all final decisions of the district courts of the United States". 28 U.S.C. 1291. A final decision generally is one which ends litigation on the merits and leaves nothing for the court to do but execute the judgment. Catlin v. U.S., 324 U.S. 229 (1945). An order granting a writ of habeas corpus is therefore not appealable unless it disposes of all of the Petitioner's claims. See, Andrews v. U.S., 373 U.S. 334, 340 (1963).

Here, the district court's order expressly did not dispose of all of petitioner's claims. Though neither party raised the issue, it is the duty of the appellate court to satisfy itself as to its jurisdiction to consider an appeal, whether or not it is raised by the parties. See, Collins v. Miller, 252 U.S. 364, 365-6, (1920). The Eleventh Circuit apparently based its jurisdiction on its decisions in Blake v. Kemp, 758 F.2d 523 (11th Cir 1985), and Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). In Blake, the appellate court held that an order granting a writ of habeas corpus and ordering a new trial was a final judgment within the meaning of 28 U.S.C. 1291, even though the order did not resolve all of the claims in the habeas petition.

Id., at 525. In Wilson, the appellate court extended the rule in Blake to permit appeals from orders granting new sentencing proceedings, even though not reaching other sentencing claims.

These decisions are in direct conflict with the decisions of the Eighth Circuit. In Stewart v. Bishop, 403 F.2d 674 (8th Cir. 1968), it was held that, when a district court grants habeas relief to a petitioner on some, but not all, of the claims presented for consideration, the court of appeals does not have jurisdiction to review the district court's decision unless its order also finally disposes of the remaining claims. In Gray v Swenson, 430 F.2d 9 (8th Cir. 1970), the court cited Stewart with approval and interpreted Rule 54(b), Fed.R.Civ.P, to prohibit appeals when all habeas claims are not finally decided by the district courts order. This conflict between the Eighth and Eleventh Circuits has been noted by the Second Circuit in Bermudez v. Smith, 797 F.2d 108 (2nd Cir. 1986), though the Second Circuit avoided having to decide which school of thought to follow. At least one member of this Court has also noted the conflict. See, Kemp v. Blake, cert. denied, 474 U.S. 998 (1985) (White, J., dissenting).

This is an issue that will continue to occur, as demonstrated by this case. Petitioner is now in the posture of having motions for stay of execution pending before this Court, and the District Court, based on the same habeas petition, but on different grounds. Indeed, Petitioner will necessarily have to litigate the remaining claims before the District Court, the appellate court, and, possibly, before this Court. Petitioner will have two rounds of appeals from the same habeas petition. If this issue as to what constitutes a final judgment in an order granting habeas relief is not resolved, such piecemeal litigation is likely to occur in other cases. More significantly for Petitioner, if the Eleventh Circuit had no jurisdiction over his appeal, the decision to re-instate his death sentence must be voided.

WHEREFORE, Plaintiff prays this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Mark Menser, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, by U.S. Mail, this 6 day of November, 1989.

Attorney